FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

VS.

LARRY G. HARDISON, ET AL.,
Respondents.

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL.,
Petitioners,

VS.

LARRY G. HARDISON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Statement of Facts

Larry G. Hardison was employed by Trans World Airlines (TWA) on June 5, 1967, as a stores clerk in Building No. 1 at TWA's Kansas City Overhaul Base, located at Kansas City International Airport. (A.22, 23). He subsequently became a member of the International Associa-

tion of Machinists and Aerospace Workers, AFL-CIO, International Association of Machinists and Aerospace Workers District 142, and International Association of Machinists and Aerospace Workers Local Lodge 1650 (hereinafter collectively referred to as the "union" or "IAM"). (A.22, 25).

Hardison's employment with TWA was covered by a collective bargaining agreement between TWA and the IAM, dated August 24, 1966. (A.22, 210-218). That contract provided *inter alia*:

> "The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement." (A.214).

At the time Hardison applied for employment, he was not a member of the Worldwide Church of God, and indicated on his employment application that he would be willing to work weekend shifts. (A.25). Until the time that Hardison joined the Worldwide Church of God, he did in fact, when scheduled, work Friday evenings and Saturdays. (A.66-67, 73-74).

Hardison began to study the teachings of the Worldwide Church of God in the spring of 1968. (A.66). One of the chief tenets of this particular religion is that no servile work could be performed on the Sabbath, which is observed from sunset Friday to sunset Saturday. (A.67). Additionally there are seven designated "Holy days" throughout the calendar year which are observed in the same fashion. (A.25).

In April, 1968, when Hardison began studying the teachings of the Worldwide Church of God, he informed

Everett Kussman, Manager of TWA's Stores System, of his belief in observance of the Sabbath from sunset Friday to sunset Saturday. (A.27-28). Hardison continued to study the teachings of the Worldwide Church of God, and again in September, 1968, he informed Mr. Kussman of the nature of his religious observances including his Sabbath and holy days. (A.28-29). At that time Kussman had stated that he would be agreeable to allowing Hardison to switch his holy days for all contract-provided holidays. Kussman's commitment was not a blanket accommodation, but rather a commitment to "consider" Hardison's holiday requests. (A.28-29).

Hardison officially joined the Worldwide Church of God in September, 1968 and at that time he voluntarily transferred to the graveyard shift (11:00 P.M. to 7:30 A.M.) so as to avoid any conflicts between his Sabbath observance and his scheduled working hours. (A.66-67). On the graveyard shift Hardison was off work from 7:00 A.M. Friday to 11:30 P.M. Sunday. (A.66-67). This shift change thus eliminated the need for the Company to provide accommodation for Hardison's Sabbath observance.

In December, 1968, Hardison voluntarily transferred from the Stores Stock Room Section in Building No. 1 to the Stores Progress Section in Building No. 2, so that he would be able to work the day shift (7:00 A.M. to 3:30 P.M.). (A.67-68). This transfer also allowed Hardison to fulfill his religious observances since he was scheduled to work Monday through Friday.

The transfer to Building No. 2 affected Hardison's seniority position, since the Building No. 2 Stores Progress Section and the Building No. 1 Stores Stock Room Section were in separate seniority groups. (A.23, 75, 229, 248). Hardison moved from a relatively high seniority position in Building No. 1 to the second lowest seniority position

in Building No. 2. (A.24, 239, 248). Hardison experienced no difficulty in observing his Sabbath until March, 1969, when Mr. Wyatt, the man with less seniority than Hardison, went on vacation. Hardison, being next in line of seniority, was scheduled to work Wyatt's position which included working Friday evenings and Saturdays. (A.68). This would have required Hardison to violate his Sabbath. (A.68).

On March 6, 1969, realizing that the vacation schedule would create a problem with Hardison's observance of the Sabbath, Mr. Kussman initiated a meeting with Hardison and the union steward, James Tinder. The purpose of that meeting, according to Kussman, was " 'to make sure that we had no misunderstanding' about what Hardison's obligations were." (A.126, IAM Brief 8).

The discussion at that meeting centered around what Hardison could do to accommodate himself, and whether it would be acceptable to the Company and the Union. (A.126-128). First, Kussman suggested that Hardison exchange jobs or shifts with another employee to avoid Sabbath work. (A.127). The Union would not agree to any such exchange, unless it was made under the standard provisions of the collective bargaining agreement—that is, if another job was put up for bid, Hardison could bid for it and obtain it only if he was the most senior employee to bid. (A.83-85, 126-128). Since there were no jobs open for bid, and since Hardison didn't have sufficient seniority to bid on any other jobs, the Union's veto effectively blocked Kussman's suggestion. (A.77, 83, 91-92, 229). No special procedure would be employed to accommodate Hardison's Sabbath observance.

The second alternative was proposed by Hardison himself. He suggested that he be allowed to have Saturdays

off without pay; the Union did not object to that proposal, but the Company would not agree. (A.82-83, 127-128, 229).

A third alternative was also proposed by Mr. Hardison. He offered to work six days per week, without any extra pay or overtime pay, so long as he could have the Sabbath off. (A.71). Hardison in fact "indicated that he was willing to work any hours, take any combination of days off, and work any shift as long as he did not have to work between sundown Friday and sundown Saturday." (A.36). The Union rejected this proposal. (A.71).

Still another alternative was proposed by Hardison. Mr. Hardison knew of an employee on the graveyard shift who was unhappy with his shift. Hardison suggested that he and that employee be allowed to swap shifts. Again, however, the Union objected to this proposed "swap" claiming that it would "adversely affect the seniority rights" of other persons. (A.83-84, 229, IAM Brief 9).

From this meeting it was concluded that nothing could be done to accommodate Hardison's Sabbath observance. (A.31, 229). Even though there were more than 200 people available who could perform Hardison's job, there was no attempt to contact any of them, to propose or arrange for a swap. (A.134, 258). The Company's policy on accommodation of Saturday Sabbath observance was to "allow the person to accommodate himself." Where that is impossible, they would "terminate the person because he couldn't meet his work schedule." (A.154-155).

Hardison was absent from his scheduled work on his Sabbath on March 8 and March 15. He had asked to be excused for both days but was refused. (A.31-32).

A meeting was held with Hardison and TWA and IAM personnel on March 31, 1969, after which W. J. Butcher, the Supervisor of Stores Planning and Control, wrote

Hardison a letter. While acknowledging Hardison's religious beliefs, Butcher informed him that if he did not report for work on March 22, a discharge hearing would be held. (A.32-34). Hardison was absent on March 22 and a discharge hearing was scheduled for March 28, 1969. (A.34).

Hardison, prior to the discharge hearing, voluntarily transferred to the twilight (3:00 p.m.-11:30 p.m.) shift. In keeping with his religious beliefs he left work at sundown on Friday, March 28, 1969. (A.170-171).

The Union's position at the discharge hearing was to plead for leniency. It did not matter to the Union whether the Company violated the Civil Rights Act of 1964. (A.169). In fact, at the discharge hearing, there was no mention made by the Union of a possible violation of the Civil Rights Act of 1964. (A.174). The discharge was effective April 2, 1969.

Proceedings Below

After having exhausted his administrative remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., Hardison filed suit in the United States District Court for the Western District of Missouri on February 10, 1972. He charged that both TWA and the Union discriminated against him because of his religious beliefs. After the filing of extensive stipulations of fact, the case was tried on October 18, 1972.

The district court, while upholding the constitutional validity of the Act and applicable EEOC guidelines, found that the Company and the Union had fulfilled their obligations to accommodate the religious beliefs of the employee. The court reasoned that although the EEOC regulation 29 C.F.R. §1605.1 speaks in terms of the employer's duty to accommodate, the provision should be interpreted to apply to unions as well as to employers. In this case, however,

the court concluded that both the Union and the Company had provided reasonable accommodation. Allowing Hardison to swap shifts or change jobs would have required the Union to ignore seniority provisions which the court found were not designed with the intention to discriminate. The court held that Title VII did not require the Union to ignore provisions of a bona fide seniority system. This, it held, would impose an undue hardship on the Union. As to the other alternatives the trial court found that an undue hardship would have resulted to the Company if Hardison had been allowed to work a four-day week. If his position had been left vacant, the Company would have been deprived of "its regular manpower," and likewise replacing Hardison would have worked an undue hardship since TWA would have to pay overtime wages to the replacement. Thus, it was concluded that both the Union and the Company had reasonably accommodated Hardison.

In its review, the Eighth Circuit Court of Appeals held that the Act and the applicable regulations did not violate the Establishment Clause of the First Amendment. The Court of Appeals, relying heavily on the trial court's findings of fact, concluded that the employer had not made a reasonable effort to accommodate Hardison's religious beliefs. It found that there were a number of possible accommodations within the framework of the collective bargaining agreement which could have been offered to Hardison. It was also held that a collective bargaining agreement whose seniority provisions precluded *any* reasonable accommodation is prima facie evidence of a violation of the Act by both the Union and the Company. Further, a union may be liable if it purposefully acts or refuses to act in a manner which obstructs reasonable accommodation efforts by the employer. The Court of Appeals did not review the effect of the Union's refusal to ignore the seniority provisions since that issue was not raised on appeal.

SUMMARY OF ARGUMENT

I.A. A collective bargaining agreement does not exempt a union or an employer from the duty to reasonably accommodate the religious beliefs of an employee. The Civil Rights Act of 1964 is paramount over a collective bargaining agreement which makes no provision for the reasonable accommodation of an employee's religious observances, and the seniority rights under a collective bargaining agreement must yield to an act of Congress furthering a strong public policy. Thus, neither a union nor an employer can claim "undue hardship" based upon an inflexible collective bargaining agreement.

B. Under Section 701(j), the employer has the burden of proving that reasonable accommodation would result in an undue hardship. That burden cannot be met by mere speculation as to what might have happened if the employee's religious beliefs had been accommodated, when several reasonable alternatives appear to have existed. An employer cannot speculate that a shift swap would have resulted in complaints from other employees, where the employer failed to ascertain whether one of 200 qualified employees was willing to replace the Sabbatarian at his job. Neither can the employer claim that vacancy in the Sabbatarian's job would have caused an undue hardship, when the vacancy could have been filled by another qualified employee or by a supervisor on the same shift. Where it appears that accommodation would have resulted in payment of overtime wages for a shift or part of a shift, that showing does not in itself, amount to a showing of undue hardship. Reasonable accommodation may result in some inconvenience or costs to the employer, and whether that inconvenience or expense amounts to undue hardship must be determined on the facts of each case. But the payment of overtime wages for the accommodation of only one employee is not a showing of undue hardship.

II. The duty of reasonable accommodation does not violate the establishment clause of the First Amendment. It meets each requirement of the three-fold test applied by this Court to laws challenged under the establishment clause. First, the law reflects a clearly secular purpose. No particular religion is favored by Section 701(j). In fact, the law advances neutrality—placing Sabbatarians on an equal footing with majoritarians, thereby allowing them the *same* freedom to exercise their religious beliefs without being deprived of employment opportunities. Thus, Section 701(j) does not advance any particular religion; rather, it insures equal employment opportunities for *all* individuals, regardless of their religious beliefs. Secondly, the reasonable accommodation duty has a primary effect that neither advances nor inhibits religion. The effect of Section 701(j) is that *employment security* is afforded to individuals—not to any particular church. The employment security derived from Section 701(j) is afforded to all individuals. Any indirect benefits derived by religious institutions do not make the law Constitutionally invalid. Here, Congress simply intended to afford all individuals equal employment opportunities, without regard for their religious preferences. Lastly, the duty imposed by Section 701(j) does not involve excessive government entanglement. The duty is placed upon the employer, and not the government, to provide reasonable accommodation for employees' religious beliefs. The only government involvement is that of the Equal Employment Opportunity Commission and the courts, in reviewing the employer's compliance with the law. That involvement is by no means excessive, and is incidental to the primary obligation placed upon the employer. Thus, Section 701(j), which fosters employment opportunities for all individuals without regard for their religious preferences, is and should be declared by this Court to be Constitutionally valid.

ARGUMENT

I. A Collective Bargaining Agreement's Seniority Provisions Which Preclude Any Reasonable Accommodation for Religious Observance by Employees Cannot Be Used to Frustrate the Obligation of an Employer Under Sec. 701(j) of the 1964 Civil Rights Act.

A. The Union's contention elevates a privately negotiated collective bargaining agreement to a position higher than that of an Act of Congress.

The Union does not deny that there were accommodations available for Hardison. However, the various alternatives noted by the Court of Appeals are rejected by the Union in its brief because they would violate or abridge "contractual rights of other employees". (IAM Brief 25). The Union's position throughout this litigation has been that there were not any accommodations within the collective bargaining agreement "which would not violate the contract rights of other employees". (IAM Brief 9, A.229-77, 84, 91-92).

Under the guise of protecting the contractual rights of non-Sabbatarians, the Union is exempting its Sabbatarian members from coverage of Section 701(j) of the Civil Rights Act of 1964. The Union emphasizes the fact that Hardison voluntarily transferred from the graveyard shift to the day shift where he had less seniority. (A.229). That contention implies that the duty of religious accommodation attempts are only feasible with senior employees. This surely is not what Congress intended since Section 701(j) applies not only to current employees who may have sufficient seniority, but also to "prospective employees" who have no seniority. The Union would have this Court interpret the Act to mean that a seven-day operation, such as that of TWA, would never have to hire Sabbatarians. As stated by the Court of Appeals:

> If Saturday work inevitably falls to the employees with lowest seniority, one may well ask whether such seniority provisions would not effectively preclude TWA from ever hiring those Seventh Day Adventists, Orthodox Jews, and members of the Worldwide Church of God whose religious convictions preclude work from sundown on Friday until sundown on Saturday. *It is no answer to such a person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again.* (Emphasis added) (A.260).

Respondent will admit that an important role is played by collective bargaining units in stabilizing the work force, securing better working conditions and generally helping a large number of working people. But a collective bargaining agreement should never take precedence over an Act of Congress. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006 (1971); *Local 189, United Papermakers & Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980 (5th Cir. 1969) and *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D.Va. 1968).

This Court made it clear in *Franks* v. *Bowman Transporation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251 (1976), that collective bargaining agreements and seniority systems may be modified by statute or court action. As stated there:

> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract.

This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest.[40] Tilton v. Missouri Pacific Railroad Co., 376 U.S. 169 (1964) (construing §§9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act of 1948, 50 U.S.C. §§459(c)(1)-(2), which provided that a reemployed returning veteran should enjoy the seniority status he would have acquired but for his absence in military service): Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) (construing the comparable provision of the Selective Training and Service Act of 1940). The Court has also held that a collective bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. Ford Motor Company v. Huffman, 345 U.S. 330 (1953). *And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests.* Pellicer v. Brotherhood of Railway and Steamship Clerks, 217 F.2d 205 (CA5, 1954) cert. denied, 349 U.S. 912 (1955). See also Cooper and Sobol, 82 Harv. L. Rev., at 1605.

96 S.Ct. at 1271. (Emphasis added).

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40. [C]laims under Title VII involve the vindication of a major public interest. . . ." Section-By-Section Analysis, accompanying The Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972).

The Court of Appeals did not give much weight to the argument that Hardison affected the duty of the employer by changing shifts[1], since to deny him that right would have been "to discriminate against [him] with respect to his . . . conditions, or privileges of employment because of [his] . . . religion." 42 U.S.C. 2000e-2(a)(1) (A.255).

The Union assumes the posture that its collective bargaining agreement is sacrosanct and above federal law. They state: "If that assignment (Saturday work) is considered undesirable, the employer, or if the employees are represented by a Union, the Collective Bargaining Agreement will have to state the method for determining who shall be required to fill that undesired assignment." (IAM Brief 16).

What about Congress? Are we to totally ignore the *affirmative* duty they placed on an employer to "make reasonable accommodations" to the religious needs of employees where those accommodations "can be made without undue hardship to the employer's business?"

Congress did not provide that Section 701(j) applies only in the absence of conflicting collective bargaining agreements. It can be assumed that Congress was aware of the existence of collective bargaining agreements when it enacted Section 701(j). It also can be assumed that Congress was aware that its action would have an effect on the employment relationship between employers and their employees with respect to the employee's religion. Senator Randolph, the sponsor wanted:

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1. It should be noted that although Hardison changed shifts, he still was not required to work on his Sabbath since he changed to a Monday to Friday schedule.

"to assume that freedom from religious discrimination in the employment of workers is for all time guaranteed by law. . ."

and

"to resolve by legislation—and in a way I think was originally intended by the [1964] Civil Rights Act—[an issue] which the courts apparently have not resolved." 118 Cong. Rec. 705, 706.

That "issue" was the extent to which Title VII's ban on religious discrimination limited an employer's freedom to discharge or refuse to hire an individual whose religious practices or observances conflicted with the employer's work schedules. Senator Randolph referred to *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971), which affirmed by an equally divided Court a Sixth Circuit decision[2], sustaining the lawfulness of an employer's discharge of an employee who, for religious reasons refused to work on Sundays.[3]

This Court held in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971):

> What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of race or other impermissible classification. 401 U.S. at 430.

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2. 429 F.2d 324 (6th Cir. 1970).

3. Senator Randolph inserted into the Congressional Record the Sixth Circuit's opinion and this Court's order of affirmance in *Dewey*, a district court opinion in a similar case, and the EEOC's guidelines on religious discrimination. (which imposed a reasonable accommodation requirement nearly identical to that proposed by Senator Randolph). 118 Cong. Rec. 706-730.

In this instance the "barrier" is a collective bargaining agreement that effectively denies employees the protection intended by Congress when it enacted Section 701(j).

The Union recreated the fabled offer of milk to the stork and the fox. It took the position that it was "totally agreeable to any adjustment that could be made for plaintiff so long as it didn't deprive another employee of seniority rights". (A.91). That was the good news. The bad news was, there were no such adjustments. (A.229).

Griggs also states that "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. at 431.

The Union argues that this Court was saying that an employer was not under any duty to accommodate the religious beliefs of its employees. When Congress passed Section 701(j) in 1972, they specifically spelled out what the duty of an employer was to be. As stated earlier, one of the purposes behind the enactment of the 1972 enactment was to clarify what Congress meant.

It can hardly be disputed that the superimposing of a collective bargaining agreement over the duty to accommodate has a discriminatory effect upon Sabbatarians.

Policies which have a discriminatory effect are seldom sustained. *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *United States* v. *International Brotherhood of Electrical Workers, Local 38*, 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970); *Weeks* v. *Southern Bell Telephone & Telegraph Company*, 408 F.2d 228 (5th Cir. 1969); *Bowe* v. *Colgate Palmolive Company*, 416 F.2d 711 (7th Cir. 1969); *Cheatwood* v. *South Central Bell Telephone & Telegraph Com-*

pany, 303 F.Supp. 754 (D.Ala. 1969); *Meadows* v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975).

This Court did not in *General Electric Co.* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401 (1976), say that "effect" was no longer a controlling principle in Title VII cases. Rather it held that the respondents, in *that* case, had not met their burden of proof.

There is no question that in this case that the burden of proof has been met by Hardison. The Union even acknowledges that "Sabbatarians are disadvantaged because of their inability to work on Saturday." (IAM Brief 35). That "self-imposed inability" is the result of the employees' exercising rights guaranteed by the Constitution of the United States to freely exercise their religion.

Congress was aware that since we live in a society that generally acknowledges Sunday as a Sabbath, that Saturday Sabbatarians are placed at a disadvantge. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961).

By enacting this statute, Congress intended to place Sabbatarians on an equal footing with the majority who can freely exercise their religion.

Under the Union's theory of the case there can never be such a thing as an accommodation. The Union felt it was under no obligation to even see if a voluntary swap could be made.

It would seem that the detailed analysis given to the previous EEOC guidelines is not very helpful, nor really germane, since Congress has told us what they meant, regardless of how the administrative agencies or the Courts interpreted the previous guidelines.

The purpose behind the "religious accommodation" provision is to insure that a person is not discriminated against because of the practice of his religion. The purpose behind Title VII, among other things, was to see that the job market was not restricted to persons because of their religion. The Union seems to feel that these goals are unimportant if accommodations towards that goal violate a collective bargaining agreement.

The Union contends that Congress did not want to force another employee to work on Saturday if the employee chose otherwise. There is absolutely nothing in the record to support the conclusion that someone would have been "forced" to work. There was no attempt on the part of the Union to discover whether any of the two hundred qualified employees would have been willing to swap shifts with Hardison. A voluntary swap of shifts between two persons would not destroy the bona fide seniority systems of Section 703(h).

The Union concedes that Section 701(j) might have some validity if the resulting transfers were voluntary. However, under their interpretation of their collective bargaining agreement, there can never be a voluntary transfer for the purpose of accommodating a person's religious observance.[4]

B. There was no attempt on the part of the Company to reasonably accommodate the religious practices of Hardison.

The duty placed on an employer by Congress is to "demonstrate that he is unable to reasonably accommo-

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4. Hardison's supervisor, Kussman, admitted in response to a question from the Court that without the Union seniority requirements "there would not be that problem" of finding volunteers who would have been willing to have traded Saturday off for Sunday off. (A.140).

date (to) an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j).

How TWA construed that burden is illustrated by the following exchange between Judge Oliver and Mr. Stone, the Director of Industrial Relations:

> The Court: What is TWA's policy, Mr. Stone, as to recognition of conscientious religious scruples against working on Saturday?
>
> The Witness: Well, in any instance that I have known about where people had problems of that kind, except this instance, they have been able to adjust them by actually observing the day they preferred.
>
> . . .
>
> The Court: I say, what is your policy if they can't be adjusted by reason of the application of the seniority provisions in your Union contract?
>
> The Witness: Well, we would try wherever we could to make adjustments, *allow the person to accommodate himself*. (Emphasis added.) (A.154-155).

Hardison, when he went to his employer to reach some accommodation, offered to work any hours, take any combination of days off, and work any shift so long as he did not have to work on his Sabbath. (A.36).

The only attempts at accommodation made by TWA were that they (1) agreed to the Union steward seeking a swap or days off (2) agreed to allow holy days off if Hardison worked Christian holy days.[5] (A.28). TWA contends that it fulfilled its obligation by doing this, and nothing more should be required of the Company. That's

5. Even the offer to allow Hardison off his holy days was conditional, although it never became an issue. (A.30).

about as much, or little, effort as was made in *Jackson* v. *Veri-Fresh Poultry, Inc.*, 304 F.Supp. 1276 (E.D.La. 1969) and in *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F.Supp. 1 (D.Ore. 1973).

TWA appears to concede that "it is virtually impossible for an employer to demonstrate that an actual accommodation without undue hardship could not be made, particularly if the employer is large." (TWA Brief 47)[6] That may well be the point that Congress was trying to make in enacting this legislation.

TWA takes the position that by agreeing to waive the seniority provisions of the contract it fulfilled its duty, even though the Union refused to acquiesce. It is admitted by TWA that no real accommodation effort was attempted.

Several possible accommodations were discussed but none were ever instituted. Hardison stood ready to do whatever was requested of him. TWA said he could change shifts. He was agreeable. The Union wasn't. TWA said he could change jobs. He was agreeable. The Union wasn't. The Union said he could work a four-day week. He was agreeable. TWA wasn't. TWA said he could work a six day week. He was agreeable. The Union wasn't.

The only thing that TWA and the Union agreed on was that Hardison couldn't be accommodated because of the provisions of the collective bargaining agreement.

Although TWA conceded there were two hundred workers who could replace Hardison, no attempt was made to contact any of the two hundred to see if *one* was willing to work his shift. TWA never even asked for a variance

6. *See also*: Edwards & Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich. L. Rev. 599 (1971).

to permit a shift swap for Hardison. (A.261). Where two hundred employees were qualified to perform Hardison's job, it is suggested that TWA's failure to seek a variance is a violation of its duty of reasonable accomodation. Certainly TWA cannot claim that it comes within the EEOC guideline which provides in part that an undue hardship "may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications . . . " 29 C.F.R. §1605.1(a)(3). In fact, the opposite is true. *No* undue hardship has been demonstrated by this employer when it totally failed to inquire of two hundred "qualified" employees, and when it failed to seek a variance.

In its brief, TWA argues against the alternatives specifically noted by the Eighth Circuit. (TWA brief 53). Specifically, the Court of Appeals observed that TWA could have permitted Hardison to work a four-day week. Hardison was willing, but TWA wasn't. (A.256). TWA argues that this accommodation was not feasible because of the provision in its collective bargaining agreement which provides that "Except in an emergency, an employee will not be required to work overtime against his wishes." (TWA brief 53, A.215-216). Yet TWA didn't even inquire of two hundred available employees. It did *not* demonstrate that this alternative would have required an employee to work "against his wishes." Perhaps one or more employees would have volunteered to work overtime. TWA totally failed to prove that accommodation would have resulted in any employee working overtime "against his wishes."

Further, it is interesting to note that TWA *could* have required an employee to work overtime "against his wishes," if the situation was "an emergency". TWA has argued to this Court and the courts below that it would

have been an "undue hardship" on the Company to have Hardison's job vacant for a shift or part of a shift. Yet if indeed this were true, the collective bargaining agreement provided the solution. If Hardison's absence presented an "undue hardship," then the Company could have *required* an employee to work overtime, if in fact none volunteered for the overtime (which TWA failed to prove), pursuant to the emergency overtime clause of the collective bargaining agreement.

The Union, in its brief, concedes that there was another alternative available within the terms of the collective bargaining agreement. TWA could have filled Hardison's job with supervisory personnel. (IAM brief 25, A.256). This alternative is rejected, however, because it would cause some other shop function to suffer. Again, however, TWA failed to meet its burden by demonstrating that this alternative would in fact create that effect. The alternative must be put to a test by the employer.

Lastly, it is suggested that the payment of overtime wages for one shift per week for one employee does *not* constitute "undue hardship" within the meaning of Section 701(j) or 29 C.F.R. §1605.1(a)(3). The District Court stated that "the duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on the job and also observe their religion." (A.240). But, as the Court of Appeals observed:

> The regulation does not preclude some cost to the employer any more than it precludes some degree of inconvenience to effect a reasonable accommodation. (A.258).

This Court made it clear in *Franks* v. *Bowman Transportation Co., Inc., supra,* that seniority rights are not

"indefeasibly vested," and such rights and employee expectations may be modified or give way to "statutes furthering a strong public policy." 96 S.Ct. at 1271. The same must be true of the employer's "expectations." No one denies that the duty of reasonable accommodation may result in some inconvenience or cost to the employer. But the employer's duty under Section 701(j) *is* reasonable accommodation. The payment of overtime wages for a shift or part of a shift, even if required for the employer to effect accommodation (which TWA did not prove in this case) does not amount to "undue hardship." No evidence was offered by TWA, which would demonstrate that this additional cost would have put the company "out of business." In fact, the evidence reflected that Hardison was the *only* employee of TWA whose religious beliefs might have necessitated payment of overtime wages. It can hardly be said that this evidence demonstrates the type of "undue hardship" exception envisioned by Congress.

If it is true that the "employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted,"[7] then TWA has no ground at all on which to stand. In this case, TWA never attempted an accommodation of Hardison's religious beliefs. He was fired the first time TWA was called upon to provide some accommodation for Hardison. Up until March, 1969, Hardison had "accommodated himself," in accordance with TWA's policy. (A.154-155).

TWA's chief concern appears to be speculation on what *might* have happened if Hardison's religious beliefs had been accommodated. The company relies upon antici-

7. *Draper* v. *U. S. Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1975); *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F.Supp. 937, 941-2 (M.D.Ala. 1974).

pated grumblings of other employees which might have occurred. Such "grumblings" are not an "undue hardship" contemplated by the statute. *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975); *Draper* v. *U. S. Pipe & Foundry, supra.*

If futuristic and speculative predictions amount to "undue hardship" under Section 701(j), then the law enacted by Congress has no real meaning or effect.

II. The 1972 "Religious Accommodation" Amendment and EEOC's 1967 Guideline Do Not Violate the Establishment Clause of the First Amendment.

As will be developed, it is obvious that the "religious accommodation" provisions of Title VII do not violate the Establishment Clause of the First Amendment but rather fulfill a valid congressional goal—the elimination of discrimination in employment based on an individual's religion.

The purpose of the 1972 amendment was clarification by Congress that a person's religious beliefs and practices should not be a factor in the area of employment.

The amendment is far from rigid; rather, it takes into consideration the individual circumstances of each case and thereby is a proper balance between the rights and duties of the employer to function in the business world without discriminating and the rights and duties of an employee to freely exercise his religion and be able to compete equally in the job market.

The "accommodation" provision is the very heart of the ban on religious discrimination.

Petitioners have not challenged Title VII's basic prohibition against religious discrimination in employment by private employers. This is a proper exercise of con-

gressional power under the Commerce Clause[8] and cannot be considered a "law respecting an establishment of religion."

A. The background of Section 701(j) of the Civil Rights Act.

Congress focused its primary attention on the problem of racial discrimination when it considered Title VII of the 1964 Civil Rights Act. There is scant legislative history concerning the inclusion of religious discrimination in the prescribed employment practices, and what can be found is not very illuminating.

It should be clear, however, that Congress included religion as a proscribed factor because its inclusion reflects a recognition that the exercise of religious freedom in the United States has always been considered a fundamental right which lies at the heart of a free society.[9]

In 1966 the United States Equal Employment Opportunity Commission issued guidelines which were intended to give meaning and substance to the proscription of religious discrimination contained in Section 703(a)(1) of Title VII.[10] After a year's experience with those guidelines, the EEOC issued new guidelines on July 10, 1967, which included the obligation on the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be

8. 110 Cong. Rec. 1528, 7207-7212. *Cf. Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).

9. And it has been included in most state fair employment procedure laws. Edwards & Kaplan, "Religious Discrimination and the Role of Arbitration Under Title VII," 69 Mich. L. Rev. 599, 602 (1971).

10. 31 Fed. Reg. 8370 (1966).

made without an undue hardship on the conduct of the employer's business.[11]

These guidelines were extensively discussed in *Dewey* v. *Reynolds Metals Co.* The District Court ruled in favor of Dewey.[12] The Court of Appeals for the Sixth Circuit reversed, holding *inter alia*, that Title VII did not ban facially neutral employment practices which had the effect of terminating Dewey's employment because of his religious beliefs and practices.[13] The Supreme Court affirmed that decision by an equally divided vote.[14]

Thus, the validity of the 1967 guidelines was questionable in 1972. Further, this Court had decided *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), in which it was stated:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. 431-432.

From 1971 to the present there have been two possible interpretations of the meaning of religious discrimination under Title VII. First, Title VII prohibits any employer action or rule that is otherwise neutral on its face, such as

11. 29 C.F.R. §1605.1.

12. 291 F.Supp. 786 (W.D.Mich. 1968); 300 F.Supp. 709 (W.D.Mich. 1969).

13. 429 F.2d 324 (6th Cir. 1970).

14. 402 U.S. 689 (1971).

a requirement that all workers must work on Saturday, if the action is not uniform in its impact on employees holding differing religious beliefs, unless the employer can prove "business necessity".[15] Second, Title VII prohibits a neutral-on-its-face employment practice which has a discriminatory impact on employees holding differing religious beliefs, but allows for exculpation (1) if the employer has made a reasonable effort to accommodate the religious needs of the employee, or (2) if an accommodation cannot be made without undue hardship to the employer.

In response to the uncertainty created by the *Dewey* decisions Congress enacted Section 701(j) in 1972. Senator Jennings Randolph, the sponsor, added this new section to show that Congress did intend to require the employers to attempt a reasonable accommodation required by the 1967 guideline. By requiring a "reasonable accommodation" test rather than a "business necessity" test, the burden on employers was lessened. Clearly, requiring employers to reasonably accommodate religious needs, unless the accommodation places undue hardship on the conduct of the employer's business, is a less onerous and burdensome standard than requiring an employer to demonstrate that a policy or practice is dictated by business necessity.

B. The religious accommodation provision renders "religion" a neutral factor in employment.

There are basically two levels of discrimination. The first level is the blanket rejection of a job seeker because of that person's race, color, *religion* or national origin.

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15. This burden is much greater than that of reasonable accommodation. See *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2nd Cir. 1971). "Necessity connotes an irresistible demand."

The company does not contend, nor do the commentators,[16] that Congress did not have the authority to outlaw discrimination on this level.

Their chief contention is that Congress exceeded its Constitutional authority by outlawing discrimination on the second level—the practice of one's religion, when they enacted the reasonable accommodation provision.

Religiously based activities are protected by the First Amendment and in this context of private employment they are protected by Congress. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1975); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

The Courts have consistently removed artificial barriers that resulted in discrimination because of race or sex.[17] Congress, in enacting 701(j) removed an artificial barrier that discriminated because of religion.

The creation of the accommodation provision is totally consistent with the *Griggs* doctrine.

However, Congress has relieved the employer of the heavy burden of *Griggs* in religion cases. They have not written an absolute. They have instead created a balancing factor. The wishes of the employee are not always followed.[18]

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16. Edwards & Kaplan, *supra*: "Civil Rights—Religious Discrimination in Employment," 54 Tex. L. Rev. 616 (1976); "Is Title VII's Reasonable Accommodation Requirement a Law Respecting an Establishment of Religion," 51 Notre Dame L. Rev. 481 (1976).

17. *Phillips* v. *Martin Marietta*, 400 U.S. 542 (1971); *Griggs*, *supra*.

18. e.g. *Williams* v. *Southern Union Gas Co.*, 529 F.2d 483 (10th Cir. 1976) cert. denied, 45 LW 3363 (1976); *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975) cert. denied, 45 LW 3364; *United States* v. *City of Albuquerque*, 9 E.P.D. ¶10,182 (C.D. Cal. 1975).

C. The 1972 Amendment and 1967 Guideline meet this court's threefold Establishment Clause test.

Petitioner contends that this statute somehow benefits churches. That benefit, if there is one, is incidental and *de minimis*.[19] It is not the type prohibited by the First Amendment.

> It is sufficient to note that for the men who wrote the Religion Clause of the First Amendment the 'establishment of a religion connoted a sponsorship, financial support, and active involvement of the sovereign in religious activities. *Walz* v. *Tax Commission*, 397 U.S. 664, 701 (1970). See also *Engel* v. *Vitale*, 370 U.S. 421 (1962).

There may always be an incidental benefit to religion when Congress or the state acts in this area.[20] "It cannot be ignored that the First Amendment itself contains a religious classification." *Welsh* v. *United States*, 398 U.S. 333, 372 (1970) (White, J. dissenting).

This Court has not held, and the First Amendment "does not say that in every and all aspects there shall be a separation of Church and State." *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952).

Congress, by passing the 1972 Amendment, wanted to eliminate discrimination based on religion.

As stated by Mr. Justice Douglas in *Zorach*:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the

19. In fact this statute has been ruled to apply where there is no church or no religion. *Young* v. *Southwestern Savings and Loan Association*, 509 F.2d 140 (5th Cir. 1975).

20. E.g. *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

> schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. 343 U.S. at 314.

I. PURPOSE

This Court has just recently restated this threefold test in *Roemer* v. *Board of Public Works of Maryland*, ... U.S. ....., 44 L.W. 4939 (1976), quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971):

> First, the statute must have a secular legislative purpose: second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'

Accord: *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 772 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 678 (1971).

This Court has never found any statute enacted by Congress to be lacking a substantial secular purpose, although twice has it made such a finding in a challenge to a state statute. The claim of illegitimacy of purpose has been made often, but, with the two exceptions, it has been consistently rejected. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961); *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961)—(Sunday closing laws); *Tilton* v. *Richardson*, 403 U.S. 672 (1971)—(inclusion of

church-related colleges under the Higher Education Facilities Act of 1963); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973); *Sloan* v. *Lemon*, 413 U.S. 825 (1973)—(aid to parochial schools); *Hunt* v. *McNair*, 413 U.S. 734 (1973)—(aid to church-related colleges); *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970)—(tax exemption for houses of worship).

The two exceptions are *Abington School District* v. *Schempp*, 374 U.S. 203 (1963)—(law requiring Bible reading in public schools); and *Epperson* v. *Arkansas*, 393 U.S. 97 (1968)—(law banning teaching of evolution in public schools). These cases involved a direct religious purpose—the fostering of a particular religious belief. Such is not the case presently before this Court.

The purpose of the "religious accommodation" amendment is to insure that a person is not discriminated against because of the practice of his religion. The purpose behind Title VII was to remove artificial barriers and to open the job market to persons regardless of their religion, race, color, national origin or creed.

The protection by Title VII applies to Sabbatarians differently than other protected groups. They need to be protected in their right to freely exercise their beliefs, if—and only if—that exercise does not cause an undue hardship on their employer.

"The freedom to believe and to practice strange and, it may be foreign creeds, has classically been one of the highest values of our society." *Braunfield* v. *Brown*, 366 U.S. 599 (1961) (Brennan, J., dissenting); also *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Jones* v. *Opelika*, 319 U.S. 103 (1943); *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Follett* v. *McCormick*, 321 U.S. 573 (1944).

"Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor *impede* religious activity." *Roemer*, *supra*, 44 L.W. at 4943. (Emphasis supplied).

That is what was intended by Congress—the elimination of the situation where an employee was forced to abandon "one of the precepts of" his "religion in order to accept work. . . ." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

The right to employment is extremely important in our society. This Court recognized the value of that right many years ago in *Truax* v. *Raich*, 239 U.S. 33, 41 (1915).

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to service.

If men and women are to be terminated from employment because their religious beliefs do not allow them to work on Saturdays, then a substantial minority segment of the nation's work force will be denied the opportunity to compete as equal job competitors with those individuals who subscribe to majoritarian religious beliefs and practices. Unless some effort is made to accommodate these religious practices, there will be discrimination on the basis of religion which Section 703(a) of Title VII was enacted to prevent.

Unquestionably, by attacking the evil of discrimination because of religion in employment, Congress has acted to facilitate the free exercise of religion.

The burden, if it is a burden, on employers to cease discriminating on the basis of religion was placed on them

by enactment of Section 703(a) of Title VII effective July 2, 1965, and was not safely placed there by any EEOC guideline or the enactment of Section 701(j), effective March 24, 1972. The amendment did not change existing law but rather codified a number of Federal Court decisions.

Any reliance placed on the "Sunday closing" cases is misplaced. Chief Justice Warren noted in *Braunfield* v. *Brown*, 366 U.S. 599, 608 (1961), that a number of states provide by statute for an exemption of Sabbatarians "and that may well be the wisest solution to the problem." This is exactly what Congress has done in this instance.

II. EFFECT

The primary effect of the 1972 amendment and the 1967 guideline is *not to advance* religion, as claimed by petitioners, but rather *to protect*, among other things, the religious freedom of those who observe a day other than Sunday, as their holy day of rest.

The Constitutional ban addresses itself to statutes that "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent." *Abington School District* v. *Schempp*, 374 U.S. 203, 236 (Brennan, J. concurring).

There is no effect on religion in the present case. *McCollum* v. *Board of Education*, 333 U.S. 202 (1948); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). The effect that is forbidden is *primary*. Thus the Prohibition Act contained an exemption for the use of sacramental wine (41 Stat. 308), which was upheld in *People* v. *Marquis*, 291 Ill. 121, 125 N.E. 757 (1919). And as this Court noted in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), Congress has exempted the Amish from the payment of social security

taxes, 26 U.S.C. §1402(h). Persons with religious objections to abortions are protected from dismissal, 42 U.S.C. §300(a)(7).

And it is clear that, "not every law that confers an 'indirect', 'remote' or incidental benefit upon religious institutions is, for that reason alone, constitutionally invalid," *Nyquist, supra*, 413 U.S. at 771; *Roemer, supra; Tilton, supra; Walz, supra.*

There is no "sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz, supra*, 397 U.S. at 668.

Government is neither theocratic nor antagonistic to religion. It must remain neutral. But the First Amendment does not forbid it from taking cognizance of the nature of the people.

> For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion to those who do believe. *Zorach, supra*, 343 U.S. at 313-314.

The effect of the accommodation on religious institutions, if there is one, is so remote as to be *de minimis*. The primary benefit (freedom from employment discrimination), accrues to *individuals* and not any religious institution. This type of "aid" has been upheld repeatedly. E.g. *Everson* v. *Board of Education*, 330 U.S. 1 (1947)—(school bus transportation for parochial students); *Board of Education* v. *Allen*, 392 U.S. 236 (1968)—(textbooks

for parochial students). This Court recently reaffirmed these holdings in *Roemer* v. *Board of Public Works, supra*:

> *Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity. 44 L.W. at 4942.

Nor is the effect of Section 701(j) unconstitutional on the ground that certain religions are more favored than others. *All* aspects of religious observance and practice are covered by the law, and *all* religions are treated equally.[21] The fact that some religions may have more or different kinds of religiously-dictated observances than others does not invalidate a law that applies equally to all.

This primary effect of ending religious discrimination in employment is simply to ensure that each individual employee will be, to the greatest extent possible, treated identically with every other employee. It ensures that one's religion does not function to penalize his employment opportunities. Title VII attacks discrimination rather than fosters religion.

Since our society generally observes the Sabbath on Sunday, *McGowan, supra,* Congress would have been perpetuating an inequity and failing in their duty to protect religious freedom of Saturday Sabbatarians by not enacting 701(j):

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious

21. Including non-religions. "Congress, through Title VII, has provided the Courts with a means to preserve religious diversity from forced religious conformity," *Young* v. *Southwestern Savings & Loan Assn.*, 509 F.2d 140, 141 (5th Cir. 1975). An atheist could not be compelled to attend a devotional service.

> minorities to conform to the prevailing officially approved religion is plain. *Engel* v. *Vitale,* 370 U.S. 421, 431 (1961).

Petitioners seem to ignore this Court's pronouncement in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), that a *particular* religious sect, the Amish, were exempt from a state compulsory education law. There the statute applied to all, as does Section 701(j). However, in *Yoder* it was said:

> A regulation neutral on its face may, in its application nonetheless offend the constitutional requirements for governmental neutrality if it unduly burdens the free exercise of religion. 406 U.S. at 220.

If Hardison had been employed by a governmental agency then he would have been protected by the Constitution. *Sherbert, supra.* What Congress did with the enactment of Title VII was to apply this Constitutional standard to private employees.

This is certainly nothing new and has been done to outlaw race discrimination in the private sector. *Runyan* v. *McCrary,* ..... U.S. ....., 44 L.W. 5034 (1976); *Jones* v. *Mayer,* 392 U.S. 409 (1968); and *Tillman* v. *Wheaton-Haven Recreation Assn.,* 410 U.S. 431 (1973).

Since the effect applies to individuals, 701(j) does not violate the First Amendment.

> The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families. *Committee for*

Public Education and Religious Liberty v. *Nyquist*, *supra*, 413 U.S. at 82.

III. ENTANGLEMENT

This Court has dealt with several types of cases involving "excessive entanglement" of government in religion.

Some of these relate to monitoring or auditing financial aid. *Roemer, supra; Tilton, supra; Hunt, supra.*

Others relate to sincerity of belief. As was stated at *Welsh* v. *United States*, 398 U.S. 333, 370 (1970), White, J. dissenting:

> The Court could as Congress has done exempt religious objectors to wars. And such an exemption would be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert* v. *Verner*. *See also Gillette* v. *United States*, 401 U.S. 437 (1971).

And of course, *Walz, supra,* where the government is required to intimately analyze a religious organization to determine its eligibility for tax-exempt status.

There is no excessive entanglement in the present case.

In *Cummins* v. *Parker Seal Co.*, 516 F.2d 544, 553-554 (6th Cir. 1975), the Sixth Circuit said:

> For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion.

The question of sincerity is not an issue here. It seldom is.[22]

However, the determination of sincerity initially is made by the Company, not a governmental agency. The role of the EEOC and the Courts is to determine compliance with the statute.

Since religious discrimination was outlawed under 703(a), obviously it makes a difference what a person's religious tenets are.

Any involvement the government has in Title VII religion cases is peripheral and mandated by the Congressional desire to outlaw religious discrimination in employment. What little entanglement there is is for a secular purpose—to ensure compliance with the law. General supervision has never been forbidden. (See *Zorach, supra; Roemer, supra.*)

Petitioner talks of the "wall" between church and state being breached.[23] However, there is no wall. There is a "blurred, indistinct and valuable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614.

It is blurred because each case stands alone. Congress has extended the Constitutional right to practice one's religion to the private sector. This is no more unconstitutional than to exempt Sabbatarians from Sunday closing laws. *Braunfield* v. *Brown,* 366 U.S. 599, 614 (1961), Brennan, J. dissenting.

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22. *Cummins, supra; Draper* v. *U. S. Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1975); *Young, supra.*

23. *Cummins, supra,* dissenting opinion.

The freedom to practice one's religion is not absolute, *Reynolds* v. *United States,* 98 U.S. 187 (1878); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944); nor should it be so.

Some entanglement is always required. Were *any* entanglement fatal, then no law could grant tax exemptions to churches, or any laws posed forbidding liquor stores or adult book stores to be located near a church.

Government should not take a hostile attitude toward religion because there are "unavoidable accommodations necessary to achieve the maximum enjoyment of each and all of them. . . ." *Abington School District, supra,* 374 U.S. at 306, Goldberg, J. concurring.

Congress has not written an absolute. An employer is not always required to accommodate whatever religious beliefs his employees have.

An individual's religious beliefs and practices must give way, if he wishes to remain employed, if an employer can demonstrate that these practices are unreasonable or that the practice places an undue hardship on the employer.

Section 701(j) is a practical statute designed to allow for the religious diversity for which our forefathers fought, while at the same time allowing employees to compete in the business world.

In the present case Hardison was denied that right because he abided by the tenets of his religion.

The primary purpose of Section 701(j) was to protect Hardison's job against treatment like he was subjected to by TWA. The effect of §701(j) was to allow employers to adjust their work schedules and rules, when necessary, to embrace all persons of all religious beliefs into their employment and to be considered by their personnel policies.

The only excessive entanglement involved in this case, was the personal efforts which Hardison attempted in accommodating his employer and these efforts were participated in through non-governmental procedures.

Let us not be myopic—there is not a violation of the Establishment Clause in this case. The only incidental benefit present in this case, by compliance with §701(j) and the preceding Equal Employment Opportunity Commission guideline is one that fosters consideration for the schedules of working men with sincere beliefs about their religions, and not any religions to which they may or may not belong.

CONCLUSION

For the foregoing reasons, Larry G. Hardison submits that the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed in all respects.

Respectfully submitted,

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